

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term, 1978

No.

**78-1114**

Supreme Court, U. S.

**FILED**

**JAN 15 1979**

**MICHAEL RODAK, JR., CLERK**

SECRETARY OF COMMERCE OF THE UNITED STATES

LOS ANGELES COUNTY, a body corporate and politic;  
LOS ANGELES COUNTY BOARD OF SUPERVISORS;  
LOS ANGELES COUNTY FLOOD CONTROL DISTRICT;  
LOS ANGELES COUNTY ENGINEER; FACILITIES  
DEPARTMENT OF LOS ANGELES COUNTY;

Appellants,

Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA,  
a nonprofit corporation; ENGINEERING CONTRACTORS  
ASSOCIATION, a nonprofit corporation; AMERICAN SUB-  
CONTRACTORS ASSOCIATION, a nonprofit corporation;  
LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL  
CONTRACTORS ASSOCIATION, INC., a nonprofit corporation;  
STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY,  
a corporation; GORDON H. BALL, INC., a corporation;  
STODDARD ENTERPRISES, a sole proprietorship; and  
GRANITE CONSTRUCTION COMPANY, a corporation,

Appellees.

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Appeal From the United States District Court  
Central District of California

---

**JURISDICTIONAL STATEMENT**

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LOS ANGELES COUNTY BOARD OF  
SUPERVISORS; LOS ANGELES COUNTY  
ENGINEER; FACILITIES DEPARTMENT  
OF LOS ANGELES COUNTY

**IN THE  
SUPREME COURT  
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October Term, 1978

No. \_\_\_\_\_

SECRETARY OF COMMERCE OF THE UNITED STATES  
DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF  
COMMERCE; LOS ANGELES COUNTY, a body corporate  
and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS;  
LOS ANGELES COUNTY FLOOD CONTROL DISTRICT;  
LOS ANGELES COUNTY ENGINEER; FACILITIES  
DEPARTMENT OF LOS ANGELES COUNTY; CITY OF  
LOS ANGELES, a municipal corporation; LOS ANGELES  
CITY COUNCIL; DEPARTMENT OF RECREATION AND  
PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT  
OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA,  
a nonprofit corporation; ENGINEERING CONTRACTORS  
ASSOCIATION, a nonprofit corporation; AMERICAN SUB-  
CONTRACTORS ASSOCIATION, a nonprofit corporation;  
LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL  
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COUNTY FLOOD CONTROL DISTRICT;  
LOS ANGELES COUNTY BOARD OF  
SUPERVISORS; LOS ANGELES COUNTY  
ENGINEER; FACILITIES DEPARTMENT  
OF LOS ANGELES COUNTY

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October Term, 1978  
No. \_\_\_\_\_

SECRETARY OF COMMERCE OF THE  
UNITED STATES DEPARTMENT OF COMMERCE;  
U.S. DEPARTMENT OF COMMERCE;  
LOS ANGELES COUNTY, a body corporate and  
politic; LOS ANGELES COUNTY BOARD OF  
SUPERVISORS; LOS ANGELES COUNTY FLOOD  
CONTROL DISTRICT; LOS ANGELES COUNTY  
ENGINEER; FACILITIES DEPARTMENT OF  
LOS ANGELES COUNTY; CITY OF LOS ANGELES,  
a municipal corporation; LOS ANGELES CITY  
COUNCIL; DEPARTMENT OF RECREATION AND  
PARKS OF THE CITY OF LOS ANGELES;  
DEPARTMENT OF PUBLIC WORKS OF THE  
CITY OF LOS ANGELES,

Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF  
CALIFORNIA, a nonprofit corporation; ENGINEER-  
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corporation; AMERICAN SUBCONTRACTORS  
ASSOCIATION, a nonprofit corporation; LOS  
ANGELES COUNTY CHAPTER, NATIONAL  
ELECTRICAL CONTRACTORS ASSOCIATION, INC.,  
a nonprofit corporation; STEVE P. RADOS, INC.,  
a corporation; GRIFFITH COMPANY, a corporation;  
GORDON H. BALL, INC., a corporation;  
STODDARD ENTERPRISES, a sole proprietorship;  
and GRANITE CONSTRUCTION COMPANY,  
a corporation,

Appellees.

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JURISDICTIONAL STATEMENT

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1.

OPINION BELOW

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The district court, on October 20, 1978,  
filed its memorandum opinion and order, which  
are not yet reported. Several other parties have  
taken appeals from the court's order. All  
references to the court's opinion will be to the  
appendix to the Jurisdictional Statement already  
filed in this case by the City of Los Angeles.

JURISDICTION

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On November 2, 1977, the district court  
held unconstitutional Section 103(f)(2) of the Public  
Works Employment Act of 1977, Pub. L. 95-28,  
91 Stat. 116, 42 U.S.C. 6705(f)(2), and enjoined  
the appellants from implementing the statute.  
The opinion is reported at 441 F.Supp. 955.

On July 3, 1978, this Court vacated and  
remanded the case to the district court for  
consideration of mootness. \_\_\_\_ U.S. \_\_\_\_, 98 S.  
Ct. 3133, 57 L.Ed.2d 1153.

On October 20, 1978, the district court  
ruled that the case is not moot and reinstated its  
earlier judgment dated November 2, 1977, Notice  
of Appeal to this Court was filed on November 17,  
1978 (App., *infra*). The jurisdiction of this  
Court is invoked under 28 U.S.C. 1252.

2.



## QUESTIONS PRESENTED

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Whether Section 103(f)(2) of the Public Works Employment Act of 1977 and the regulations issued pursuant to the statute are valid under the Fifth Amendment and are consistent with Title VI of the Civil Rights Act of 1964.

Whether this action is moot.

## STATUTE INVOLVED

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Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2) provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding

sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

## STATEMENT

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In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispensing the funds through the Economic Development Administration. In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects.

The new statute, entitled the Public Works Employment Act of 1977, made various changes in the 1976 Act, including the addition of Section 103(f)(2), quoted above.

The Secretary of Commerce subsequently issued regulations and guidelines to implement Section 103(f)(2). In pertinent part, the regulations provide (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434):

(1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

(2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

The Economic Development Administration notified the County on June 14, 1977, that it was eligible for an allocation under the Act to fund public works projects. The County authorized the submission of a list of public works projects totaling \$28,109,085. Based upon these applications, the Economic Development Administration sent an approval and award of grant to the County for each of its seventeen projects. The approvals were received at various times. The first such approval was dated August 22, 1977, and all of the approvals were dated on or before September 30, 1977. The grants were accepted on behalf of the County by execution of the forms and certificates which were requested by the Economic Development Administration.

Thereafter, on October 5, 1977, appellees, various contractors and associations representing contractors, subcontractors and suppliers in the California construction industry, filed this action in the district court seeking declaratory and injunctive relief. Specifically, appellees sought to bar the Secretary of Commerce and the defendant political subdivisions of the City and County of Los Angeles from enforcing Section 103(f)(2) in the 65 grants approved by the Secretary for the Los Angeles area.

On November 2, 1977, the district court granted appellees' motion for summary judgment, holding Section 103(f)(2) and the Secretary's regulations unconstitutional. The court also held the statute and the regulations invalid and illegal for inconsistency with Title VI of the Civil Rights Act of 1964. As to constitutionality, the court held that the Act violated the Due Process Clause of the Fifth Amendment because it established a racial quota and did not advance a governmental interest unrelated to race. The Act was not properly remedial in nature, the court concluded, because, in the court's view, there was insufficient evidence of discrimination before Congress when it enacted Section 103(f)(2), and no such evidence had been presented in the hearing on the merits. The court further concluded that underemployed minorities in the construction industry could be aided by racially neutral legislation having a less detrimental impact on non-minority contractors. The court enjoined future enforcement of Section 103(f)(2) and the Secretary's regulations, but it stated that its order does not apply to funds previously granted by the Secretary or to any action



taken by any of the defendants with respect to those funds. 441 F.Supp. 955.

Since the district court's ruling did not affect the monies already granted, specifications for each of the County projects were approved by the County and notices inviting bids were also published. Contracts were awarded for all but one of appellants' projects.

For one project which has a phased construction schedule, approval of the specifications and the advertisement for bids on the final phase are planned for the month of February 1979. That phased project involves the general development at Charmlee County Park.

Construction activities have commenced pursuant to each of the awarded contracts and several of the projects are near completion.

The district court's order was appealed to this Court where it was vacated and remanded to the district court for consideration of mootness. \_\_\_ U.S. \_\_\_, 98 S.Ct. 3133, 57 L.Ed.2d 1153.

On October 20, 1978, the district court ruled that the case is not moot and ordered that its judgment reported at 441 F.Supp. 955 be reinstated in full. The district court found that the case is not moot because the allegedly wrongful conduct of the appellants can reasonably be expected to recur yet evade appellate review.

## THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

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All of the monies which were to be allocated under the statute have been allocated and the local appellants have proceeded to award contracts for the public works projects. Thus, there is no controversy within the scope of the district court's order of November 2, 1977, which enjoined enforcement of the minority business enterprise provisions with regard to any grant made after that date. Accordingly, since the district court's order enjoins nothing which the appellants are empowered to do the case is moot and should be dismissed because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); White v. Regester, 422 U.S. 935 (1974).

It is speculative whether or not Congress will pass additional public works legislation and, if so, what provisions it will include for minority business enterprises. "[W]hen the chance of repetition is remote and speculative there is no jurisdiction (citations omitted). . . . 'The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.' United States v. W. T. Grant Co., 345 U.S. 629 (1953)." Williams v. Alioto, 549 F.2d 136, 142 (9th Cir. 1977).

A decision based upon the premise that Congress may in the future authorize and appropriate

additional funds would constitute an impermissible advisory opinion from the judiciary to the legislature. Preise v. Newkirk, 422 U.S. 395, 401 (1975).

On the merits, the case presents substantial constitutional questions under the Fifth, Thirteenth and Fourteenth Amendments, in addition to the statutory question of the compatibility of the statute with Title VI of the Civil Rights Act of 1964. Moreover, this case raises the question of Congress' authority to enact legislation designed to remedy forms of past discrimination.

## CONCLUSION

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For reasons stated above, it is respectfully submitted that the questions presented are substantial and of great public importance. It is submitted that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

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Chief, Public Works Division

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LOS ANGELES COUNTY FLOOD  
CONTROL DISTRICT;  
LOS ANGELES COUNTY BOARD  
OF SUPERVISORS; LOS ANGELES  
COUNTY ENGINEER; FACILITIES  
DEPARTMENT OF LOS ANGELES  
COUNTY



APPENDIX

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F I L E D  
Nov 17 4:08 PM '78  
Clerk U.S. District  
Court  
Central Dist. of Calif.

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LOS ANGELES COUNTY FLOOD  
CONTROL DISTRICT.

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT  
OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS  
OF CALIFORNIA, a nonprofit corporation;  
ENGINEERING CONTRACTORS ASSOCIATION,  
a nonprofit corporation; AMERICAN  
SUBCONTRACTORS ASSOCIATION, a non-  
profit corporation; LOS ANGELES COUNTY  
CHAPTER, NATIONAL ELECTRICAL  
CONTRACTORS ASSOCIATION, INC., a  
nonprofit corporation; STEVE P. RADOS,  
INC., a corporation; GRIFFITH COMPANY,  
a corporation; FORDON H. BALL, INC., a  
corporation; STODDARD ENTERPRISES, a  
sole proprietorship; and GRANITE  
CONSTRUCTION COMPANY, a corporation,  
Plaintiffs,

vs.

11.

SECRETARY OF COMMERCE OF THE )  
UNITED STATES DEPARTMENT OF )  
COMMERCE; U.S. DEPARTMENT OF )  
COMMERCE; LOS ANGELES COUNTY, )  
a body corporate and politic; LOS ANGELES )  
COUNTY BOARD OF SUPERVISORS; )  
LOS ANGELES FLOOD CONTROL DISTRICT; )  
LOS ANGELES COUNTY ENGINEER; )  
FACILITIES DEPARTMENT OF LOS ANGELES )  
COUNTY; CITY OF LOS ANGELES, a municipal )  
corporation; LOS ANGELES CITY COUNCIL; )  
DEPARTMENT OF RECREATION AND PARKS )  
OF THE CITY OF LOS ANGELES; DEPART- )  
MENT OF PUBLIC WORKS OF THE CITY )  
OF LOS ANGELES, )  
Defendants. )

Civil Action  
No. 77-3738-AAH

NOTICE OF APPEAL  
TO THE SUPREME COURT  
OF THE UNITED STATES.

NOTICE IS HEREBY GIVEN that Los Angeles  
County, a body corporate and politic, Los Angeles  
County Board of Supervisors, Los Angeles County  
Flood Control District, Los Angeles County  
Engineer and Facilities Department of Los Angeles  
County, defendants in the above named action,  
hereby appeal to the Supreme Court of the United States  
from the memorandum opinion and order entered in  
the docket on October 20, 1978, to the extent that  
they declared and determined that the case, cause

12.

and issues in the above-named case are not moot, to the extent that they reinstated in full the summary judgment for declaratory and injunctive relief entered in this action on November 2, 1977, see 441 F.Supp. 955, 1044 (C.D. Cal. 1977), and further to the extent that they declared and determined that Section 103(f)(2) of Public Law 95-28, 42 U.S.C. 6705(f)(2) and the rules and regulations issued thereunder and relating thereto are unconstitutional.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

DATED: November 17, 1978.

JOHN H. LARSON, County Counsel  
GERALD F. CRUMP, Division Chief  
Public Works Division  
CHARLES J. MOORE, Deputy County  
Counsel

By /s/ G. F. Crump  
GERALD F. CRUMP, Division  
Chief  
Public Works Division